

## REMARKS

This Response is submitted in reply to the Office Action mailed on June 2, 2008. A one-month extension of time fee is submitted herewith. The Commissioner is hereby authorized to charge any other fees that may be required or credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-486 on the account statement.

Claims 1, 3-12 and 14-17 are pending in the application. Claims 2 and 13 were previously cancelled. In the Office Action, Claims 1, 2-12 and 14-17 are rejected under 35 U.S.C. §112, first paragraph; Claims 1, 3-12 and 14-17 are rejected under 35 U.S.C. §112, second paragraph; Claims 1, 5, 8, 10 and 11 are rejected under 35 U.S.C. §102(b), and Claims 1, 3-12 and 14-17 are rejected under 35 U.S.C. §103(a). In response, Applicants have amended Claims 1 and 12. The amendments do not add new matter and are supported in the specification at page 2, lines 5-6 and page 3, line 19, and page 4, lines 12-26. In view of the amendments and for at least the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 1, 2-12 and 14-17 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement. Applicants first note that Claim 2 was canceled previously. Specifically, the Office Action asserts that the storage of product at room temperature has not been disclosed and that it is not clear what is included in the term "room temperature stable." In response, Applicants amend Claims 1 and 12 to recite specifically that the milk product is room temperature microbial stable. Applicants assert that the claims comply with the enablement requirement because room temperature stability is inherent for products subject to high temperature processing using a process selected from the group consisting of pasteurization, sterilization, UHT treatment and combinations thereof as required, in part, by independent Claims 1 and 12.

Easily accessible evidence establishes that milk products subject to pasteurization, sterilization, UHT treatment and combinations thereof will be room temperature microbial stable. Regarding UHT treatment, it is known that UHT milk has a typical shelf life of six to nine months. In fact, many milk products in North American foods are made using UHT milk, such as McDonalds McFlurries. UHT milk is also used on airplanes. UHT milk is also sold on

American military bases in Puerto Rico and Korea due to limited availability of milk supplies and refrigeration. See, [http://en.wikipedia.org/wiki/Ultra-high-temperature\\_processing](http://en.wikipedia.org/wiki/Ultra-high-temperature_processing). Regarding pasteurization, it is known that UHT treatment is a type of pasteurization and can allow milk products to be stored unrefrigerated (room temperature) for 3-4 months. See, <http://en.wikipedia.org/wiki/Pasteurization>. Finally, sterilization describes the process of freeing completely an article of all living microorganisms such as, for example, virus, bacteria, fungi, or their spores or parasites and is usually considered a harsher form of pasteurization such that it can be used instead of preservatives, refrigeration, and other ways to preserve food. See, [http://en.wikipedia.org/wiki/Sterilization\\_\(microbiology\)](http://en.wikipedia.org/wiki/Sterilization_(microbiology)).

Accordingly, because one skilled in the art would know that room temperature microbial stability results from pasteurization, sterilization, UHT treatment and combinations thereof, Applicants respectfully submit that Claims 1, 3-12 and 14-17 comply with the enablement requirement under 35 U.S.C. § 112, first paragraph, and request that the rejection be withdrawn.

In the Office Action, Claims 1, 3-12 and 14-17 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, the Office Action asserts that it is unclear whether the term “room temperature stable” refers to a stable emulsion, microbial stability or stability from fat oxidation. As noted above, Applicants have amended independent Claims 1 and 12 to recite a milk product that is room temperature microbial stable.

Accordingly, Applicants respectfully submit that Claims 1, 3-12 and 14-17 meet the requirements under 35 U.S.C. § 112, second paragraph, and request that the rejection be withdrawn.

In the Office Action, Claims 1, 5, 8, 10 and 11 are rejected under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 4,012,533 to Jonas (“*Jonas*”). Amended independent Claim 1 recites, in part, a milk product that is room temperature stable and does not need to be cooled to provide the foamed composition. The amendment is supported in the specification at page 4, lines 12-26. Applicants respectfully submit that *Jonas* fails to disclose or suggest every element of the present claims.

*Jonas* fails to disclose or suggest a milk product that is room temperature stable and does not need to be cooled to provide the foamed composition as required, in part, by Claim 1. By

contrast, the compositions of *Jonas* require chilling to form foam compositions. Specifically, the examples in *Jonas* teach whipping in a continuous ice cream freezer at 46-50°F, whipping in an M-10 Creamery Package continuous freezer at 47-48°F, and whipping in a bowl jacketed with slush ice or ice water slurry to maintain a whip temperature of 40°F. See, *Jonas*, column 10, lines 24-30; column 11, lines 47-51; column 12, lines 50-55, and column 14, lines 56-68. Not only does the composition in *Jonas* require cooling prior to whipping, it also requires freezing after the whipping step to maintain stability. See, *Jonas*, column 10, lines 35-37 and 56-58; column 11, lines 54-56; column 12, lines 63-68, and column 14, lines 67-68. Therefore, rather than the room temperature preparation of the present claims, *Jonas* teaches a consistent cold process to form its composition.

The Office Action asserts that *Jonas* teaches that it is essential that whipping be carried out above the freezing temperature of the mixture (column 8, lines 15-25) and that combining fat and protein as emulsion at 60°F can serve as feed for whipping (column 9, lines 50-55). See, Office Action, page 5, lines 1-4. Applicants submit, however, that these excerpts do not overcome the deficiency of *Jonas*. The present claims require a room temperature product that is foamed without cooling from that room temperature state. Even if *Jonas* teaches whipping the product above freezing temperatures or combining fat and protein as emulsion at 60°F, as the Office Action asserts, this does not teach or suggest a room temperature product foamed without cooling. As stated above, *Jonas* explicitly teaches that the product may be fed at 63-64°F into an ice cream freezer, but outputs at 46-50°F, which is clearly below room temperature. See, *Jonas*, column 10, lines 24-30, column 11, lines 47-51, column 12, lines 28-30, and column 15, lines 56-62. Therefore, contrary to the present claims, *Jonas* teaches a product that needs to be cooled to provide a foamed composition.

Accordingly, because *Jonas* is deficient with respect to the present claims, Applicants respectfully request that the rejection of Claims 1, 5, 8, 10 and 11 under 35 U.S.C. § 102(b) or, in the alternative, under 35 U.S.C. § 103(a), be withdrawn.

In the Office Action, Claims 3-4 and 6-7 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Jonas* in view of U.S. Patent No. 6,033,711 to Gonsalves, et al. ("*Gonsalves*"). Applicants submit that the patentability of Claim 1, established above, renders moot the

obviousness rejection of dependent Claims 3-4 and 6-7. Moreover, the Office Action relies on *Gonsalves* to recite elements of the dependent claims.

In the Office Action, Claims 9 and 12-14 are rejected under 35 U.S.C. § 103(a) as being unpatentable over *Jonas* in view of *Gonsalves*, further in view of U.S. Patent No. 5,759,609 to Lynch (“*Lynch*”). Applicants note that Claim 13 was canceled previously. Applicants submit that the patentability of Claim 1, established above, renders moot the obviousness rejection of dependent Claim 9. Regarding independent Claim 12, Applicants respectfully submit that the cited references, alone or in combination, fail to disclose or suggest every element of the rejected claims.

As stated above with reference to Claim 1, *Jonas* fails to disclose or suggest a milk product that is room temperature stable and does not need to be cooled to provide the foamed composition as also required, in part, by Claim 12. *Gonsalves* and *Lynch* fail to remedy this deficiency.

*Gonsalves* is directed to a fat-free/low-fat frozen whipped topping, preferably a non-dairy, frozen whipped topping which be freeze-thawed stable and which will retain a stable foam structure and texture for around 3 weeks during storage. See, *Gonsalves*, column 1, lines 10-15. *Gonsalves* teaches essentially a non-dairy food product, which teaches away from the present claims directed to a milk product. Moreover, there is no teaching or guidance in *Gonsalves* regarding a method of forming a milk product that provides a foamed composition for beverages, in accordance with Claim 12.

*Lynch* is directed to a low-fat whipped topping, more specifically to a dairy-free non-fat whipped topping food product that can be stored frozen in an unwhipped state for an indefinite period of time, thawed and whipped into a whipped dessert, which explicitly teaches away from Claim 12. See, *Lynch*, column 2, lines 8-10. Moreover, *Lynch* fails to disclose, suggest, or even teach a method of forming a milk product for providing at room temperature a foamed composition for beverages as required, in part, by Claim 12.

In the Office Action, Claims 15-17 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Jonas* in view of *Gonsalves*, further in view of the combination of *Lynch* and U.S. Patent No. 3,230,091 to Thompson (“*Thompson*”). Applicants submit that the patentability of Claims 1 and 12, established above, renders moot the obviousness rejection of Claim 16,

dependent from Claim 12, and Claims 15 and 17, dependent from Claim 1. Moreover, the Office Action relies on the cited references to recite elements of the dependent claims.

In the Office Action, Claim 1, 3-8, 10-11, 15 and 17 are rejected under 35 U.S.C. §102(a) as being unpatentable over U.S. Patent No. 3,519,440 to Staackmann (“*Staackmann*”) in view of *Gonsalves*. Applicants assume that the Examiner meant to reject these claims under 35 U.S.C. §103(a). As such, Applicants respectfully submit that the cited references, alone or in combination, fail to disclose or suggest every element of the present claims.

Amended independent Claim 1 recites, in part a milk product for providing at room temperature, both by shaking and with a foaming device, a foamed composition for beverages. This amendment is supported in the specification at page 2, lines 5-6 and page 3, line 19. *Staackmann* fails to disclose or suggest a milk product that can provide a foamed composition both by shaking and with a foaming device. Instead, the product of *Staackmann* requires that the product be confined to an aerosol can. Specifically, *Staackmann* states, “this composition is specially formulated to be stably confined under pressure in an aerosol dispensing container.” See, *Staackmann*, column 2, lines 12-15. *Staackmann* goes on to state that a primary unique property of this topping composition is “stability to microbial attack without resort to refrigeration when container in the aerosol dispensing unit” (emphasis added). See, *Staackmann*, column 2, lines 15-20. Therefore, while the present claims provide a foamed composition both by shaking and with a foaming device, *Staackmann* requires that its composition be under pressure in an aerosol can to provide a foamed composition.

*Gonsalves* fails to remedy the above deficiency in *Staackmann*, as the Office Action relies on *Gonsalves* to disclose specific combinations of gum stabilizers recited in claims dependent from Claim 1. Therefore, the combination of *Staackmann* and *Gonsalves* fails to disclose or suggest every element of the present claims.

Accordingly, Applicants respectfully request that the obviousness rejections of Claims 1, 3-12 and 14-17 be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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